Complete Auto Transit *and* Thomas H. Compton

Teamsters Local 528, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Thomas H. Compton. Cases 10-CA-15168 and 10-CB-3192

August 6, 1981

DECISION AND ORDER

On September 9, 1980, Administrative Law Judge Howard I. Grossman issued the attached Decision in this proceeding. Thereafter, Respondent Union filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent Complete Auto Transit, Atlanta, Georgia, its officers, agents, successors, and assigns, and Respondent Teamsters Local 528, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Atlanta, Georgia, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, except that the attached notices are substituted for those of the Administrative Law Judge.

CHAIRMAN FANNING, dissenting:

I would dismiss the complaint. There is no indication or suggestion of discrimination here in the selection of stewards, nor is any illegality argued in Christian's exercise of a steward's superseniority other than encouraging or rewarding service as a steward. That, as I explained in my dissenting opinion in *Dairylea Cooperative Inc.*, 219 NLRB 656, 661 (1975), is a matter of substantial, legitimate interest to a labor organization and is consistent with the interests of all unit members, union and nonunion alike.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT grant superseniority to a union steward for job preferences or other benefits for purposes not limited to layoff and recall, without adequate justification.

WE WILL NOT discriminate against Thomas H. Compton, or any other employee, in assigning jobs, or in any other term or condition of employment, other than layoff and recall, without adequate justification to a union steward when such steward does not in fact have top seniority in terms of length of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by Section 7 of the Act.

WE WILL, jointly and severally with the Union, pay Thomas H. Compton any earnings, plus interest, he lost as a result of awarding the rail leadman job to a union steward rather than to Compton, when he had actual top seniority in terms of length of service.

COMPLETE AUTO TRANSIT

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT grant superseniority to a union steward for job preferences or other benefits for purposes not limited to layoff and recall, without adequate justification.

WE WILL NOT cause or attempt to cause Complete Auto Transit to discriminate against Thomas H. Compton, or any other employee, by assigning any job, or any other term or condition of employment, other than layoff

[1] Respondent Union has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law Judge concluded, and we agree, that Respondents unlawfully accorded superseniority to steward Charles L. Christian for purposes other than layoff and recall without adequate justification. In adopting this conclusion, however, we do not rely on the fact that Christian later was defeated in a bid for a renewed term as steward, nor on the Administrative Law Judge's finding that Christian had shown a "disinclination" to perform union duties on his own time. Additionally, in agreeing that Respondents have failed to offer adequate justification for the grant of superseniority here, we do not rely on the Administrative Law Judge's findings concerning Christian's own motivation for bidding on the rail leadman job, as opposed to the reasons proffered by Respondents for allowing him to use superseniority in making that bid.

[3] Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

and recall, to a union steward when such steward does not in fact have top seniority in terms of length of employment.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights protected by Section 7 of the Act.

WE WILL, jointly and severally with Complete Auto Transit pay Thomas H. Compton any earnings, with interest, he lost as a result of awarding the rail leadman job to a union steward rather than to Compton, when he had actual top seniority in terms of length of service.

TEAMSTERS LOCAL 528, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge: This case was heard at Atlanta, Georgia, on June 9, 1980.[1] The charges in both cases were filed on November 2 by Thomas H. Compton, an individual (herein the Charging Party, or Compton), and the order consolidating cases and complaint were issued on January 3, 1980, charging Complete Auto Transit (herein Respondent Company) with violations of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended (herein the Act), and Teamsters Local 528, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein Respondent Union), with violations of Section 8(b)(2) and (1)(A) and Section 2(6) and (7) of the Act. The primary issue is whether Respondents, enforcing a superseniority clause in a collective-bargaining agreement to which both were parties, violated the Act by granting job preference to a union steward for the position of rail leadman, instead of giving the position to the Charging Party.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondents, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Company, a Michigan corporation with an office and place of business located at Doraville, Georgia, is engaged in the interstate transportation of automobiles. During calendar year 1979, which is representative of all times material herein, Respondent Company received revenues in excess of $50,000 directly from the interstate transportation of automobiles. Respondents admit, and I find, that Respondent Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondents admit, and I find, that Respondent Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Summary of the Evidence*

1. Chronology of events

Respondents are parties to a current collective-bargaining agreement which provides that one steward "shall be granted superseniority for purposes of layoff and recall and such other employment preferences as may be useful in the performance of his duties as steward as requested by the Union . . . in writing." Superseniority for the union steward was in effect for many years without protest from union members.

Charles L. Christian had been the union steward since about 1965. Prior to August 1979, Christian received warnings from the Company for allegedly excessive time spent on union business, and was docked for time spent in grievance meetings during working time off company property. Christian filed a grievance in March 1979, asserting company interference with his performance of his duties as steward, and claiming additional pay for union work he was forced to do on his own time. The matter went to arbitration, resulting in a ruling that the steward was not entitled to additional pay, but was entitled to reasonable time during working hours for union business. There were no complaints from union members about Christian's performance as steward, at this time.

Christian's job in early 1979 was that of truck dock leadman. He worked on the first shift, from 7 a.m. until 3:30 p.m. The Company operated a second shift, from 3 p.m. until 11:30 p.m., and also a shift from 4 p.m. until 12:30 p.m. for gate employees. There was a "junior yard steward" working on the second shift, with authority to process grievances during working time in the absence of the "senior" steward.

On about August 27, pursuant to the annual bid at Respondent Company's facility, Christian bid on the job of rail leadman. Compton, who had natural seniority over Christian, also wanted this job, but was informed that Christian as steward had bid on it. Compton had previously been a rail leadman, and was working as a city truckdriver at the time of the bid. He testified that he filed a grievance with another steward over Christian's getting the rail leadman job, but was informed that there had been no violation of the contract.

Compton continued to work as a truckdriver after Christian was given the rail leadman position, although he had seniority to bid on a position as rail loader. In its amended answer, Respondent Company argues that this "election should mitigate lost earnings, if any, to that extent." In this connection, the parties stipulated that from about September 2 to about November 1, Christian, as rail leadman, earned about $8,367.43; Compton as

[1] All dates are in 1979 unless otherwise stated.

truckdriver earned about $7,225.42; while another employee, A. A. Martin, earned about $7,918.64 as a rail loader.

According to another grievance filed by Compton on November 7, the employees replaced Christian as steward with another employee on October 20. Compton protested that Christian's right to superseniority and the rail leadman job should end, according to prior practice. Respondent Union's business agent and secretary-treasurer, Jerry Cook, informed Respondent Company of this fact. Although the Company initially relied on a contract clause providing for bids "once a year at or about model change," it later agreed with the Union to offer the rail leadman job again, following normal seniority, and the job was put up for bid on November 12.

Cook testified that Compton did not bid on the job even then, and that it came back to Christian on his "natural seniority." However, the witness stated that bids did not go through his office, and that Compton could have bid without his knowledge. Christian said that he obtained the rail leadman job in November. However, he also said that he became a rail loader "sometime in December." Compton, on the other hand, testified that he bid on the rail leadman job in November, obtained it, and held it for about 3 weeks "until they went to one shift." (A letter from Cook to the Company requests possible "rebidding of all jobs due to the major decline in business.")

2. Comparison of rail leadman and truck dock leadman jobs

The parties stipulated that "in either position of truck dock leadman or rail leadman, accessibility to other employees depended upon the immediacy of the grievance; however, physical access to all yard employees was available to each job, rail leadman or truck dock leadman, except that tire and grease employees who worked in the shop were accessible only through telephone communication and messages." Management officials were present for both positions during the first shift, according to the stipulation.

The parties further agreed on a description of the rail leadman position, which "involved the setting up of paperwork for the loading of cars onto trilevel railcars. The leadman would insure that the right cars were loaded on the right trilevel railcars. In performing his duties, the leadman would inform the rail loaders of the location of the cars. The rail loaders would then go to the cars and drive the cars onto the particular railcar." Rail loaders were also required to tie down the automobiles to the railcars, and did this with two-man teams while the rail leadman directed the flow of automobiles onto the railcars.

There were eight rail loaders and one rail leadman prior to the 1979 annual bid, according to the parties. The rail leadman assisted in loading when the crew was "diminished," but on larger crews most of his time was spent on paperwork and directions to the loaders. As the parties agreed, "the amount of cars loaded ranged between 300 to 500 per day, and the rail crew finished working, depending upon the amount of cars loaded, anywhere from 10:30 a.m. to 2:00 p.m." Compensation was based on the number of cars loaded, $2.80 per car divided equally among the nine-man crew, plus an additional 4 cents for the leadman, or about 31 cents per car for each loader, and 35 cents for the rail leadman.

Despite this agreement on the facts, the parties elicited testimony on the matters covered in the stipulation. Thus, Christian asserted that the rail leadman job provided more access to employees than the job as truck dock leadman. He said that his work station was stationary as rail leadman, and that the employees knew where to find him to discuss grievances, whereas the truck dock leadman position was more mobile. Thus, in the latter job, he walked "all over" the plant, getting cars. An employee could file a grievance with him only if the former "knew where he was at." As a stationary rail leadman, however, he had access to six or eight "gate people" who "came by."

On the other hand, according to Christian, the job of the "gate people" was to put cars "everywhere" on the 15-acre plant, not at the truck dock, nor, apparently, at the rail loading station. Business Agent Cook testified that 15–20 percent of the employees were stationary, and were not in vehicles going by the rail leadman work station.

Christian also contended that his rail leadman job gave him more time to devote to union business, since his work was finished between 10 a.m. and 1:30 p.m., and he stayed after work to talk to employees, including those starting on the 3 o'clock shift. In comparison, the truck dock leadman job had a fixed ending time, 3:30 p.m. Business Agent Cook claimed that the rail leadman job had "slack time," about "15 minutes every time they got through loading one set of tri-levels." Compton, on the other hand, testified that there was no slack time when he served as rail leadman, except for breaks and lunchtime, and that he had no contact with other employees. Christian testified that breaks and lunchtimes both varied with the rail crew depending on the workload, whereas breaks for other plant employees came at 9 a.m., and lunch at 11:30 a.m.

3. Steward Christian's "motivation"

Christian stated that he was "losing pay" in the truck dock job, and that he "made up" this loss by bidding into the rail leadman position. He agreed that he had a substantial increase in income as a result of the transfer. As a truck dock employee he made $10 hourly, or $80 for an 8-hour day. However, at the "piece rate" of 35 cents per car in the rail leadman position, he could make as much as $175 daily, loading 500 cars, and do it in less time. Compton put the matter succinctly. Asked why he bid on the rail leadman position, he answered, "For more money and short hours." Christian also conceded that the rail leadman position was physically less demanding than the truck dock job.

Nonetheless, Christian affirmed that his motivation in seeking the transfer was to become "more accessible" to the employees, so that he could better perform his duties as steward. He believed that this was the accomplished result, in part because he stopped getting warnings from the Company about his union duties after the transfer.

He felt that it was "beneficial to the people" to have "less animosity" between him and the Company.

B. *Factual Analysis*

The testimonial evidence is insufficient to establish that the rail leadman job allows an incumbent in that position greater access to employees than the truck dock leadman job, or that Christian actually utilized his transfer to the rail job to improve his performance as a union steward.

The argument based on the alleged superiority of a stationary work station for the steward is inconclusive. If 15–20 percent of the employees have stationary work stations, and do not drive vehicles past the rail leadman's position (as Business Agent Cook testified), then it would seem that having the steward in a mobile job such as truck dock leadman would be better for the employees, since it would give the steward access to all of the employees instead of only some of them. Although Christian testified that employees could discuss grievances with him only if they knew "where [he] was at," they must certainly have known where he was on the truck dock leadman job, in light of the numerous warnings Christian received from the Company for grievance activity while employed on that job.

Respondents' argument based on the steward's time for union activities fares no better. Although Cook testified to the existence of "slack time" for the steward as rail leadman, Compton denied it. Cook's testimony is implausible, in light of the fact that the rail crew loaded 300–500 cars daily in less time than the normal working hours of other employees, and that the entire crew worked as a team on a piece rate basis. The crew was presumably interested in maximum production of all crew members, including the leadman, a concern which would not have been shared by hourly paid employees working with the truck dock leadman. The rail leadman had impressive responsibilities, including the "paperwork" for as many as 500 automobiles, and helping out with loading when the crew "diminished." Compton actually worked on the job, whereas Cook did not. I credit Compton's testimony, and find that the rail leadman job did not have "slack time" for union activities.

When the time for breaks and lunch is considered, Respondents' position is even worse. Employees on the rail crew, including the leadman, were the only employees having variable break and lunch periods. All other employees took breaks and lunch at fixed times. There was therefore no coincidence in these periods, and an employee on break could not know whether a steward at the rail leadman position was also having a break or eating lunch, whereas he could be certain that the truck dock leadman was sharing the same time with him.

Respondents' argument that Christian had more time *after* his shorter rail job, for union activities, is also unpersuasive. Christian could have done the same thing more easily as truck dock leadman. As a rail leadman on a light day, he could be through with work as early as 10 a.m., and would have a 5-hour wait until the second shift came on at 3 p.m. Even with a full day he was through at about 1 p.m., and had a 2-hour wait. However, as a truck dock leadman getting off at 3:30 p.m., he would have the second-shift employees already at hand. There was a junior steward on the second shift with the authority to handle grievances in the senior steward's absence, but he was equally available when Christian was a truck dock leadman.

The only evidence that Christian in fact remained after work as a rail leadman in order to perform duties as a steward is Christian's testimony. This is at odds with his clearly manifested disinclination to do union work on his own time, and with the arbitration proceeding which gave him reasonable time during work for these activities. After gaining a job with short hours, and the litigated right to perform union duties during those hours, why would he immediately have sacrificed this advantage?

Finally, and conclusively, if Christian in fact performed his steward's duties conscientiously in accordance with his testimony, why did the employees vote him out of office about 2 months after he became rail leadman? He had been a steward for about 14 years without any known complaint against him by the union members. This action by the employees actually affected has more probative weight than any of the testimonial assertions. Although Christian professed belief that amiable relations with management on his part were good for "the people," the latter did not agree with him. I do not credit Christian's testimony about his actions as steward after work, when working as a rail leadman.

In the last analysis, the testimonial evidence does not warrant departure from the stipulation of the parties as to the facts. Under that stipulation, there was access to employees and management officials by a steward employed in either position.

As for Christian's motivation in bidding for the rail leadman job, his candid testimony leaves no doubt that economic considerations were substantial if not paramount. He was losing money in the truck dock job, and made up this loss with the transfer to the rail leadman position. He thus obtained a job with more pay, shorter hours, and reduced physical requirements. Although he could have chosen a job as rail loader during the August 27 bid, with the same stationary work station which allegedly provided access to employees, this job had less pay and more physical requirements than the leadman job, and Christian did not bid on it until he was relieved as steward.

I do not question Christian's loyalty to the union cause or his recognition of his responsibilities as steward. However, as with all men, a balance must be struck between duty and private interest. Taking all the circumstances into consideration—Christian's own grievance and arbitration, his complaints about losing money, the monetary and other advantages of the rail leadman job, and the adverse vote of the employees 2 months after Christian obtained this job—I infer that the principal reason Christian bid on the rail leadman job was to advance his personal interests. This is every employee's right, of course, but its exercise is not the same as action undertaken on behalf of the employees as a whole.

The remaining factual dispute concerns which employee became rail leadman when the job was again put up for bid on November 12. I consider Compton's testimony to be the most reliable. Cook admittedly did not have

knowledge of bids on particular jobs. Although Christian claimed that he obtained the rail leadman job again even after having been relieved of superseniority, i.e., on his natural seniority, he also stated that he became a rail loader in December, without giving any reason for stepping down from the rail leadman job. This is implausible. Compton, on the other hand, said that he left the rail leadman job about 3 weeks after having obtained it when "they went to one shift." Because the rail crew was paid on a piece rate basis, and because the general decline in business indicated by one of Cook's letters suggests a decline in the rail crew's income, Compton's testimony that he returned to being a truckdriver is plausible. I credit his testimony on this issue.

C. *Legal Analysis and Conclusions*

In *Dairylea Cooperative, Inc.*,[2] and succeeding cases,[3] the Board concluded that granting superseniority to stewards in areas other than layoff and recall tends to encourage union activism and to discriminate with respect to job benefits against employees who prefer to refrain from such activity. The exceptions for layoff and recall are warranted because they encourage "the continued presence of the steward on the job" and thus further the effective administration of the bargaining agreement.[4] Accordingly, the maintenance and enforcement of overly broad clauses has been struck down, unless it was shown that they served some "aim other than the impermissible one of giving union stewards special economic or other on-the-job benefits solely because of their positions in the Union." Absent such justification, superseniority clauses which are not on their face limited to layoff and recall are presumptively unlawful, and the burden of rebutting the presumption rests with the party asserting its legality.[5]

As set forth above, the contract clause in the instant case grants superseniority to the steward "for purposes of layoff and recall and such other employment preferences as may be useful in the performance of his duties as steward . . . ." It is at least arguable that this clause is subject to the *Dairylea* presumption of illegality because there is a stated purpose beyond layoff and recall and because of the ambiguity of the additional purpose. The General Counsel, however, has not seen fit to attack the clause directly. The alleged illegality, as set forth in the complaint, is that Respondents granted superseniority to a union steward for purposes other than layoff and recall, specifically for the purpose of job preference. By so doing, the complaint further alleges, the Union caused the Company to transfer Compton "from his position of rail leadman to the position of truck driver." In his brief, the General Counsel avoids discussion of the language of the clause, and argues only the unlawfulness of the grant of superseniority.[6]

Although the Board's conclusions of law in *Dairylea* concern maintenance and enforcement of an unlawful clause, its decision contains the following language:

> Because seniority affects conditions of employment there can be no real question but that it must conform to the requirements of the Act—irrespective of its source in any agreement and even irrespective of the consent of those adversely affected.[7]

Because of this language, and because the sections of the Act violated do not necessarily involve contract terms, I conclude that the principles set forth in the *Dairylea* line of cases are dispositive herein.[8]

Utilizing these criteria, it is apparent that Respondents have shown no justification for the superseniority granted Steward Christian by giving him the rail leadman job on or about August 27. The purported reason, that of affording the steward greater access to employees, is not born out by the facts. On the contrary, the credible evidence shows that the paramount reason was the desire to give Christian economic benefits because of his position as steward, perhaps as settlement of his own dispute with the Company. This tended to convince other employees that union activism was the way to secure such benefits and, thus, unlawfully encouraged membership in the Union. It resulted in Respondent Company's discriminating against Compton, by denying him assignment to the rail leadman position, for which he expressed preference and to which he was entitled by natural seniority as against Christian.[9] Since Respondent Company again put up the rail leadman job for bid on about November 12 (as a result of Compton's grievance), and assigned him said job, it is apparent that the discrimination against him ended at that time.

In accordance with my findings above, and upon consideration of the entire record, I make the following:

CONCLUSIONS OF LAW

1. Respondent Company, Complete Auto Transit, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Union, Teamsters Local 528, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By assigning the position of rail leadman to a union steward as the result of superseniority not limited to

---

[2] 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976).

[3] *Preston Trucking Company, Inc.*, 236 NLRB 464 (1978), enfd. 610 F.2d 991 (D.C. Cir. 1979); *Connecticut Limousine Service, Inc.*, 235 NLRB 1350 (1978), enfd. as modified 600 F.2d 411 (2d Cir. 1979); *General Drivers and Helpers Local Union No. 823, etc. (Campbell "66" Express, Inc.)*, 232 NLRB 851 (1977); *Auto Warehousers, Inc.*, 227 NLRB 628 (1976).

[4] *Dairylea Cooperative, supra* at 658.

[5] *Ibid.*

[6] Fn. 8 of the General Counsel's brief contains the following sentence: "While in the instant case the specific application of the clause is at issue, the same standards apply."

[7] *Dairylea Cooperative, supra* at 659.

[8] Even when the statutory ban proscribes an unlawful contract or agreement, as, e.g., in Sec. 8(e), an unlawful application of a contract clause has been held to be violative of the Act. *Teamsters Local No. 688 (Schnuck Markets, Inc.)*, 193 NLRB 701 (1971).

[9] Although the complaint erroneously alleges that Respondent Union caused Respondent Company to transfer Compton from rail leadman to truckdriver, instead of alleging that the former caused the latter to deny Compton's bid to become a rail leadman, this is a minor variance, with the truth having been fully and fairly litigated.

layoff and recall, without adequate justification, and by thereby denying said position to the Charging Party, from about August 27, 1979, to about November 12, 1979, Respondent Company engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

4. By granting superseniority not limited to layoff and recall, without adequate justification, and by causing Respondent Company to discriminate against the Charging Party in the manner set forth in paragraph 3 above, Respondent Union engaged in unfair labor practices within the meaning of Section 8(b)(2) and (1)(A) and Section 2(6) and (7) of the Act.

5. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in the unfair labor practices set forth above, I shall recommend an order that they cease and desist therefrom, and take certain affirmative actions designed to effectuate the policies of the Act. Since I have also found that unlawful superseniority was applied so as to cause Respondent Company to discriminate against Thomas H. Compton, the Charging Party, from about August 27, 1979, to about November 12, 1979, by depriving him of the rail leadman job to which he was entitled by natural seniority, I shall recommend an order requiring Respondents jointly and severally to make Compton whole for any loss of earnings he may have suffered as a result of the discrimination against him. Backpay shall be computed in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

In connection with Respondents' backpay obligation, I conclude that Respondent Company's attempt to diminish same, by imposing a duty to mitigate damages upon Compton, is without merit. Although a discriminatorily discharged employee has certain obligations to meet in order to entitle him to backpay,[10] Compton was not discharged. Upon being discriminatorily denied assignment as a rail leadman on or about August 27, he simply continued at his old job as a truckdriver, until he received the rail leadman job on or about November 12.

Although a discharged employee has an obligation not to refuse substantially equivalent employment,[11] the job he must not refuse must be one substantially equivalent to the one from which he was discharged, and which was thus denied him. In Compton's case, the job he was denied was the rail leadman's job, not the truckdriver job which he continued to hold. Compton did not refuse the rail leadman job; in fact he demanded it. The rail loader job, which the Company says Compton should have bid for, was not substantially equivalent to the rail leadman position, because it paid a lesser piece rate and had more onerous physical requirements. Nor was it substantially equivalent to Compton's truckdriver job, because of the uncertainty of its piece rate earnings in a time of declining business. The fact that another employee, Martin, earned more as a rail loader than Compton did as a truckdriver is irrelevant. There was no way of predicting this in advance, and the comparative earnings could just as easily have been the reverse of what they were. I reject the Company's position on this issue.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I recommend the following:

ORDER[12]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Complete Auto Transit, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Granting superseniority to a union steward for job preferences or other benefits for reasons not limited to layoff and recall, without adequate justification.

(b) Discriminating against Thomas H. Compton or any other employee in assigning jobs, or in any other term and condition of employment, by according top seniority to a union steward in the assignment of such terms and conditions, other than layoff and recall, without adequate justification, where union stewards do not in fact have top seniority on a basis other than union status.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Jointly and severally with Respondent Teamsters Local 528, make Thomas H. Compton whole for any loss of earnings he may have suffered as a result of the discrimination against him, such earnings to be determined in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its establishment at Doraville, Georgia, copies of the attached notice marked "Appendix A."[13] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent Company's representative, shall be posted by Respondent Company immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in

[10] *J. H. Rutter Rex Manufacturing Co.* v. *N.L.R.B.*, 473 F.2d 223 (5th Cir. 1973), enfg. in part 194 NLRB (1971).

[11] *Ibid.*

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Company to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent Company has taken to comply herewith.

B. Respondent Teamsters Local 528, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Granting superseniority to a union steward not limited to layoff and recall, without adequate justification.

(b) Causing or attempting to cause Respondent Company to discriminate against employees in violation of Section 8(a)(3) of the Act.

(c) In any like or related manner restraining or coercing the employees of Respondent Company in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the purposes of the Act:

(a) Jointly and severally with Respondent Company make Thomas H. Compton whole for any loss of earnings he may have suffered by reason of the discrimination against him, such lost earnings to be determined in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its office and meeting halls used by or frequented by its members and employees it represents at Respondent Company's Doraville, Georgia, facility copies of the attached notice marked "Appendix B."[14] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent Union's representative, shall be posted by Respondent Local 528 immediately upon receipt thereof, and be maintained by Respondent Union for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(c) Sign and return to said Regional Director sufficient copies of the attached notice marked "Appendix B" for posting by Respondent Company, if willing, in conspicuous places, including all places where notices to employees are customarily posted.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

[14] See fn. 13, *supra.*